United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,331

WILLIAM RODGER STARNES,

Appellant,

v.

RICHARD CHAPPELL, CHAIRMAN,
United States Board of Parole, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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HANNAN, CASTIELLO & BERLOW

QUESTION PRESENTED

Whether the Court erred in granting Appellee's Motion for Summary Judgment when there were in the record uncontroverted allegations of fact which would preclude summary judgment as a matter of law?

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United States Court of Appeals

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the granting of the Defendant's Motion for Summary Judgment in the United States District Court for the District of Columbia. Jurisdiction is vested in this Court by virtue of 28 USC §§ 1291, 1294.

STATEMENT OF CASE

On March 25, 1956, Appellant was sentenced to a term of fifteen (15) years upon conviction for robbery. On May 25, 1962, he was released on parole to the Eastern District of Texas (Petition p. 1).

On August 14, 1963, a warrant for appellant's arrest, alleging parole violations, was issued by a member of the United States Board of Parole. The warrant, which is not in the record, did not bear on its face, nor have attached to it, any statement of the alleged parole violations with which the appellant was charged. On September 12, 1963, the appellant was arrested pursuant to the warrant in Cincinnati, Ohio, by agents of the Federal Bureau of Investigation. The agents delivered him immediately to the United States Marshal for the Southern District of Ohio. The appellant was confined in the Hamilton County, Ohio, jail until September 19, 1963, when he was taken to the United States Penitentiary at Terre Haute, Indiana (Resp. Ex. #7), where he remains.

On the day he was arrested, appellant was interviewed by a probation officer in the Federal Building in Cincinnati (Resp. Ex. #5). Thereafter on September 27, 1963, the appellant was interrogated by a caseworker at the penitentiary and requested an opportunity to go into his case in detail before the parole judge (Resp. Ex. #6). One day prior to this, on September 26, 1963, appellant had signed a document waiving his right to have counsel and witnesses at the parole violation hearing (Resp. Ex. #2).

On October 20, 1963, a parole violation hearing was conducted by a hearing member of the United States Board of Parole at the penitentiary (Resp. Ex. #1), and on December 3, 1963 appellant's parole was revoked (Resp. Ex. #7).

The appellant at no time saw the warrant pursuant to which he was arrested, said warrant having been delivered to the United States Marshal on September 16, 1963, some four days after appellant was ar-

rested. The Marshal thereafter returned the warrant to the United States Board of Parole bearing an endorsement that it had been executed by the arrest (Resp. Ex. #7).

On December 1, 1964, appellant filed a Petition for Declaratory Judgment in the District Court, naming appellees as respondents. Thereafter appellees filed a Motion for Summary Judgment, supporting said motion with numerous exhibits including the Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Southern District of Indiana in the case of *Starnes v. Markley*, No. TH 64-C-11 (Resp. Ex. #7), a habeas corpus proceeding by the appellant which preceded his present action. The transcript of the Indiana proceeding is not in this record, though appellant refers to it in his Petition for Declaratory Judgment. It appears from his reference (Petition p. 4) that there was testimony adduced at that hearing concerning missing or deleted portions of the transcript of the parole violation hearing which appears in this record as Respondent's Exhibit #1.

Appellees' Motion for Summary Judgment was granted without the appearance of appellant or counsel on his behalf and Notice of Appeal was timely filed.

STATUTES AND RULES INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF POINTS

1. A. The record reveals that appellant was denied procedural safeguards inherent in the parole revocation process.

   B. It was error to grant appellees' Motion for Summary Judgment because of uncontroverted allegations of fact in the record which as a matter of law preclude summary judgment.

SUMMARY OF ARGUMENT

1. A. The record reveals that appellant was taken into custody pursuant to a warrant which failed to state any alleged parole violations. Thereafter appellant was denied a preliminary interview at or reasonably near the location of the alleged violations.

   B. It was error to grant appellees' Motion for Summary Judgment when uncontroverted allegations of fact in the record precluded summary judgment as a matter of law.

ARGUMENT

A. The Record Reveals That Appellant Was Denied Procedural Safeguards Inherent in the Parole Revocation Process

The leading case in this jurisdiction concerning parole revocation and the procedural safeguards attendant to a revocation hearing is *Hyser v. Reed* (1963) 115 U.S. App. D.C. 254, 318 F.2d 225.

In *Hyser*, the Court states that the issuing of a warrant is the first

critical stage of the revocation process. The warrant should contain or have attached to it a statement of

> "the reasons why parole revocation is sought with reasonable specificity to inform the parolee of the alleged grounds and enable him to meet and answer them if he so elects." 115 U.S. App. D.C. at 272.

The Court states further that another safeguard to be afforded an alleged parole violator is a preliminary interview. This interview must

> "in order to meet standards of fairness inherent in the congressional scheme of parole, be conducted at or reasonably near the place where the alleged parole violation occurred, or the place of the violation chiefly relied upon, and promptly as is convenient after the arrest while the information is likely to be fresh and the sources are available." 115 U.S. App. D.C. at 272 (Emphasis supplied).

In the instant case, the appellant was never presented with the arrest warrant. The warrant, in fact, was received by the Marshal and returned to the Board of Parole some four days after appellant's arrest (Resp. Ex. #7). Moreover, if the warrant had been presented, the requirements of *Hyser* would not have been met because it did not contain or have attached to it a statement of the reasons why parole revocation was sought (Resp. Ex. #7).

The Court in *Hyser* sets forth clearly the procedures to be followed in a revocation proceeding. Among the steps listed are the following:

> "4. Upon executing the warrant by taking the parolee into custody, the parolee shall be lodged in a suitable place of detention as near as reasonably possible to the place of parole violation. . .
>
> "5. Within a reasonable time thereafter and before the parolee is transported to a federal prison, the of-

> ficer designated by the Board shall conduct a preliminary interview and record a summary or digest thereof. The interviewing officer shall also interview and make a summary or digest of the statements of any other persons who desire to make statements on behalf of the parolee." 115 U.S. App. D.C. 274 (Emphasis supplied).

The appellant was arrested in Cincinnati, Ohio, some 1200 miles from his parole district in Eastern Texas. He was detained for a week in the local jail in Hamilton County, Ohio, and was from there transported directly to the Federal Penitentiary at Terre Haute, Indiana (Resp. Ex. #7).

There appears in the record a "Preliminary Report of Parole Violation" signed by B. K. Bochow and dated September 27, 1963 (Resp. Ex. #6). This is the only confrontation that could be construed as the "Preliminary Interview" called for by *Hyser*, and it does not meet the requirements set forth for such an interview. It was held some two weeks after appellant's arrest and over one week after the appellant had been taken to the penitentiary. It was at this time that the appellant was first informed of his alleged violations. There is no allegation of the situs of the violations. They might very well have occurred in Texas or some other equally distant place.

Because appellant was never informed of the alleged violations with any specificity as to time or place, he had no opportunity to contact witnesses or prepare a defense. He alleges in his Petition for Declaratory Judgment that the violations occurred in Texas and this allegation as to the *situs* of the violations is nowhere controverted in the appellees' motion (Petition p. 3). If, in fact, the violations occurred in Texas, then the appellees violated the holding of *Hyser* in failing to grant the appellant a hearing or interview "reasonably near" the place of the alleged violations. There is an indication in the record (Resp. Ex. #1 p. 2) that the warrant was issued for a bad check that was passed in Texas.

This is the only reference pertaining to the reasons for the issuance of the warrant.

It is evident from the foregoing that appellant was not afforded the procedural safeguards dictated by *Hyser*.

B. It Was Error To Grant Appellees' Motion for Summary Judgment Because of Uncontroverted Allegations of Fact in the Record Which as a Matter of Law Preclude Summary Judgment

Rule 56 (c) of the Federal Rules of Civil Procedure states that

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . ."

The appellant in his original pleading alleges that the warrant was insufficient in that it failed to state the alleged parole violations. Nowhere in the appellees' pleadings is this allegation denied or controverted. Appellees state rather that the charges were read in full to appellant at the Preliminary Report interrogation. Also they plead that at the time of his arrest he admitted violations and conclude that therefore he "was obviously aware of, or must have been made aware of, the charges against him." (Memo in Support, p. 3) This in itself is a material fact that would preclude summary judgment as a matter of law under the authority of *Hyser*. Further, it cannot be determined from the record where, in fact, the violations occurred so that a suitable place for preliminary interview could be ascertained.

In *Phillips v. United States Board of Parole* (No. 19,125, decided September 1, 1965) ___ U.S. App. D.C. ___, a similar factual situation was presented to this Court. There the appellant sought reversal of

an entry of summary judgment in favor of the same appellees as here. In reversing the award of summary judgment, this Court states that

> "Although nominally a civil case, appellant's suit possesses many of the characteristics of a collateral attack on a criminal conviction. Appellant has been in the custody of the federal prison system from the inception of this litigation and has, thus, been operating under the handicaps such detention necessarily imposes upon a litigant, both in terms of ability to secure the advice of counsel and of opportunities to track down the evidence necessary to support his case. He has, moreover, been without the advice or assistance of counsel since his interview by Officer Rubens. Finally, the appellant has lacked the opportunity of appearing for himself in person, and, as a consequence, both the District Court and this Court have been deprived of another means of discovering the basis of his complaints and assaying the credibility of his representations. In these circumstances, we think it would be unfair, both to appellant and to appellees, to apply the requirements of Rule 56 with strict literalness. Appellant has neither the facilities nor has he had the opportunity to provide the documentary evidence that would have been necessary, by ordinary standards, to defeat appellees' motion for summary judgment."

The above is equally applicable to this situation. The appellant has never had the procedural protections or the type of hearing contemplated by *Hyser*. Whether, in fact, he is entitled to such is still a question which has never been afforded a full and complete inquiry. The appellant has alleged that the warrant was insufficient and that the violations occurred in Texas. The appellees have not denied these allegations. These bare uncontroverted allegations are sufficient to defeat summary judgment. *Gousales v. Seaton* (D.C. D.C. 1960) 183 F. Supp. 708. The pleadings of the party opposing summary judgment

are to be liberally construed in favor of that party. *Wood v. Precise Vac-U-Tronic, Inc.* (D.C. Pa. 1961) 192 F. Supp. 619.

CONCLUSION

For the foregoing reasons it was error for the Court to grant summary judgment. The judgment should be reversed and the appellant granted a full and complete hearing.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,331

WILLIAM RODGER STARNES,

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RICHARD CHAPPELL, CHAIRMAN
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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANT

ARGUMENT

The Ends of Justice Require That an Evidentiary Hearing Be Granted to Appellant

Contrary to appellees' contentions, appellant is entitled to have the Summary Judgment entered against him reversed and an evidentiary hearing granted on his Petition for Declaratory Judgment.

In *Sanders v. United States* (1963) 373 U.S. 1, the Court states that:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) *the ends of justice would not be served by reaching the merits of the subsequent application.*" (Emphasis supplied)

The Court further states that:

> "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application."

Though appellant had a full and complete hearing on the Writ of Habeas Corpus filed in the United States District Court for the Southern District of Indiana, he states in the Petition for Declaratory Judgment filed herein that the Indiana Court denied relief, stating that *Hyser v. Reed* (1963) 115 U.S. App. D.C. 254, 318 F.2d 225, was not binding upon it. (Pet. 2)

As set forth in Appellant's Brief filed herein, the procedural safeguards of *Hyser* were not accorded him, and the Indiana Court so found, stating that the warrant was deficient (Resp. Ex. 7, p. 2) and that the "Petitioner was not permitted to state all the details of the asserted 'justification' he desired to state." (Resp. Ex. 7, p. 4) This latter finding is based upon the statement of the Parole Hearing Member to the appellant that "You can tell me some of your story." (Resp. Ex. 1, p. 1)

To deny Appellant an evidentiary hearing on his Petition for Declaratory Judgment would be contrary to the "ends of justice" test announced in *Sanders*. The Appellant has not had the opportunity, which he now seeks, to have his allegations measured by the standards of *Hyser*.

Hyser announced new procedural safeguards for parole revocation proceedings which are binding upon and must be followed by the Appellee. Five months after *Hyser* was decided, Appellant was arrested as an alleged parole violator and the procedural safeguards were not followed. The ends of justice require that the Appellant be heard.

CONCLUSION

For the foregoing reasons the Summary Judgment awarded the Appellees should be reversed and the Appellant granted an evidentiary hearing.

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BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,331

WILLIAM RODGER STARNES, APPELLANT

v.

RICHARD CHAPPELL, CHAIRMAN, UNITED STATES BOARD OF PAROLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of the appellees, the following questions are presented:

1. Whether appellant is entitled to a second hearing in the District of Columbia where he was accorded a thorough hearing in Indiana with the assistance of counsel, and where he makes no claim that the Indiana hearing was unfair or otherwise deficient.

2. Whether appellant is entitled to be released because

(a) the parole revocation warrant by which he was retaken did not contain (or have attached to it) a statement of the charges on which the warrant was based, albeit appellant, from the time of his arrest has consistently admitted violating his parole and was fully advised of the specific charges 23 days prior to his parole revocation hearing.

(b) no preliminary interview was conducted at or near the place where the alleged violations occurred, where, at the time of his arrest and thereafter, appellant admitted several violations of his parole.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On his pleas of guilty to a three-count information charging him with armed robbery, felonious entry of a bank, and taking money with intent to steal, appellant was sentenced, in March, 1957, by the United States District Court for the Western District of Louisiana to a term of imprisonment for 15 years. He

was released on parole, in May, 1962, to the Eastern District of Texas. (Petition p. 1).[1/]

On August 14, 1963, a warrant for appellant's arrest was issued, charging him with having violated the conditions of his parole. He was arrested under this warrant on September 12, 1963, at Cincinnati, Ohio. The warrant did not bear on its face, nor have attached to it, any statement of the alleged parole violations with which appellant was charged. (Ex. #7, p. 2).

On the same day, appellant was interviewed by a United States probation officer, at which time he admitted that he had been traveling all over the United States during the preceding two months in violation of the specific instructions of his probation officer; that he had failed to report his whereabouts; that he had financed his travel by writing checks for which there were insufficient funds; and that he had had in his possession, though not on his person at the time of his retaking, a .25 caliber automatic pistol. (See "Statement of Material Facts as to which

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1/ Appellant's complaint is styled a "Petition for Declaratory Judgment." It is herein referred to as his "petition."

there is no genuine issue . . ." (at p. 1), hereinafter referred to as "Statement". See also exhibits #5 and #7, p. 2).

Appellant was not informed at the time of this interview that parolees (and mandatory releasees) have a right, under the decision in Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F. 2d 225 (1963), cert. denied sub nom., Jamison v. Chappell, 375 U.S. 957, to a hearing at or near the place of the alleged violation, as well as a right to retain counsel and obtain witnesses for such hearing. He made no request for a local hearing or for counsel. (Ex. #7, p. 3).

On September 19, 1963, appellant was transferred to the United States Penitentiary at Terre Haute, Indiana. On September 27, he was interviewed by a caseworker and was informed of the parole violations with which he was charged. He again admitted that he had failed to keep in touch with his probation officer and that he had passed several checks for which there were insufficient funds. (Statement p. 1; Ex. #7, p. 3).

On October 20, 1963, a revocation hearing was held in Terre Haute, before a member of the United States Board of Parole. There, appellant again admitted the violations he had previously admitted on September 12 and 27. On December 3, 1963, his parole was revoked. (Statement p. 2; Ex. #1, #7, p. 4).

On February 10, 1964, appellant filed an application for a writ of habeas corpus in the United States District Court for the Southern District of Indiana, alleging that the procedural safeguards to which he was entitled under 18 U.S.C. 4207, as interpreted in Hyser, had not been followed with respect to his parole revocation. The district court held a hearing and, on May 27, 1964, denied the application. The judgment was affirmed on March 31, 1965, by the United States Court of Appeals for the Seventh Circuit. Starnes v. Markley, 343 F. 2d 535 (1965). On November 1, 1965, his petition for certiorari was denied by the Supreme Court. 382 U.S. 908. Appellant, at all times and at all levels in that litigation, was provided with the assistance of counsel. (See Exhibit #7, p. 1; 343 F. 2d 535.)

On December 1, 1964--more than six months after his petition for habeas corpus was denied by the United States District Court for the Southern District of Indiana--appellant filed in the district court below a "Petition for Declaratory Judgment" in which he again alleged that he was denied procedural safeguards under Hyser, and that, as a result, his detention was illegal. In his petition he complained

of the same matters he had previously raised in his habeas corpus petition in Indiana, namely, (1) that the warrant for his retaking failed to specify the violations charged; (2) that he was entitled to but not given a local hearing.[2] On February 5, 1965, appellees filed a Motion for Summary Judgment, attaching thereto a "Statement of Material Facts as to which there is no genuine issue pursuant to Rule 9(b)" and nine exhibits. Appellees' motion was granted on February 24, 1965.

STATUTES INVOLVED

Section 4207 of Title 18 of the United States Code provides:

> A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

2/ Appellant in his pleading in the district court also alleged that the revocation hearing was invalid because he was denied his right to counsel and because he was given only a limited time in which to state why his parole should not be revoked. Since these points are not raised in appellant's brief in this Court, we deem them abandoned and therefore do not respond to them here (they were responded to in the district court). We wish to point out, however, that both points were raised and thoroughly considered in the proceedings in Indiana.

SUMMARY OF ARGUMENT

1. Because appellant, with the benefit of counsel, had previously raised in Indiana the same issues as were presented by his petition, and because he was there afforded a full evidentiary hearing, the district court properly declined to allow him to relitigate those same issues in the District of Columbia.

2.(a) Since appellant--from the time of his arrest--has consistently admitted those violations of his parole with which he was ultimately charged, it cannot be said that he was deprived of a chance to meet those charges. For that reason the defects in the warrant do not render his continued detention illegal.

(b) Appellant was not entitled to a local hearing because at the time of his arrest he admitted violating the conditions of his parole.

ARGUMENT

I

APPELLANT IS NOT ENTITLED TO A SECOND HEARING IN THE DISTRICT OF COLUMBIA WHERE HE WAS ACCORDED A THOROUGH HEARING IN INDIANA WITH ASSISTANCE OF COUNSEL, AND WHERE HE MAKES NO CLAIM THAT THE INDIANA HEARING WAS UNFAIR OR OTHERWISE DEFICIENT

Although appellees are entitled to affirmance on the merits of this case (see Point II, infra), and although evidence bearing on the merits was presented to the district court, this Court can affirm the decision of the district court without reaching the merits.

In his prior suit in the United States District Court for the Southern District of Indiana, appellant complained of the same matters as are the substance of his pleading here.[3] He was there given the assistance of counsel and a thorough evidentiary hearing was conducted at which he presented witnesses and himself appeared. At the conclusion of that hearing a judgment was entered adverse to him.[4] Again assisted by counsel, appellant took an appeal which also was decided adversely to him. Now he seeks to start over again in the District of Columbia. But he makes no claim that the Indiana hearing was unfair, incomplete or in any way deficient. In these circumstances the district court was not obliged to allow him to do so.

3/ Appellant himself has admitted that his previous suit in Indiana involved "the very issues raised in this appeal." See Appellants "Motion to Hold Appeal in Abeyance" filed in this Court on May 18, 1966.

4/ The findings of fact and conclusions of law of the district judge have been filed in the district court as Exhibit 7.

The recent cases of Thomas v. United States, ___ U.S. App. D.C. ___, 352 F. 2d 701 (1965) and Sanders v. United States, 373 U.S. 1 (1963) which deal with the question of successive applications for the same relief are of no assistance to appellant. For while this Court in Thomas, did grant a hearing to a prisoner who, for the fifth time, attacked his conviction on the same ground, it did so--and this it went to great lengths to emphasize (352 F. 2d 701, 702, 704)--only because he had not been given an evidentiary hearing in any of his four previous attempts. In this case, appellant in his single previous attempt was accorded a full and thorough hearing on the very same issues he now seeks to raise here. For that reason, the Thomas case is inapplicable and the district court properly prevented him from relitigating those issues.

Appellant relies on Phillips v. United States Board of Parole, ____ U.S. App. D.C. ___, 352 F. 2d 711 (1965). But the Court there specifically found that the prisoner in that case "[had] never had a hearing on . . . [the question presented by his complaint] . . ." (Id. at p. 715). Appellant has had such a hearing. Rather, the action of the court below--we submit--is in full compliance with the decision rendered in Phillips. For there, this Court--in reversing the entry of summary judgment against a prisoner (incarcerated in Kansas) in his action in the District of Columbia--observed that (Id. at p. 716):

> [i]t seems obvious that such suits . . . [against the Board of Parole], . . . could be more fairly and no less efficiently heard in a district closer to the prisoner's place of detention or to the locale of the events which are alleged to give rise to his claim.

And, on remand it suggested that the district court explore the possibility of transferring the case and the possibility of appointing counsel to represent the prisoner. Thus, in Phillips, this Court took the position that suits by prisoners attacking the revocation of their parole are better heard near the place of their detention where local counsel can be retained and the prisoner himself is more able to appear (see p. 716). This is precisely what occurred in this case. After his parole was revoked, appellant who was incarcerated at Terre Haute, Indiana, brought an action in the United States District Court for the Southern District of Indiana which raised the identical issues now attempted to be raised here. He was there given local counsel and himself appeared and presented witnesses. Appellant--having had a thorough hearing in what this Court has held to be a more appropriate forum--may not now obtain a second hearing in the District of Columbia.

II

APPELLANT'S PAROLE WAS REVOKED IN SUBSTANTIAL CONFORMITY WITH THE PROCEDURES SET FORTH IN HYSER

The thrust of appellant's petition is that Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F. 2d 225 (1963). cert. denied sub nom., Jamison v. Chappell, 375 U.S. 957, promulgated new procedural safeguards for parolees, and that he was entitled to, but was not accorded, the benefits of that decision (Petition p. 2).[5/]

A. Appellant alleges that the revocation of his parole was invalid because the warrant did not contain, or have attached to it, a statement of the reasons why revocation was sought (Petition pp. 2,3). But a prisoner cannot challenge the adequacy of a parole revocation hearing on the ground that there was a defect occurring prior to the hearing, unless it is shown that the defect prevented the prisoner from having the fair hearing contemplated by statute. See Weaver v. Markley, 332 F. 2d 34 (C.A. 7, 1964);

5/ Appellant was retaken on September 12, 1963. The amended rules of the Board of Parole, implementing the Hyser decision did not become effective until October 5, 1963. Although the matter is not free from doubt, we have nevertheless, for purposes of this case, assumed that appellant was entitled to the benefits of Hyser.

United States ex rel. Buono v. Kenton, 287 F. 2d 534 (C.A. 2, 1961), cert. denied, 368 U.S. 246. In Hiatt v. Campagna, 178 F. 2d 42, 46 (C.A. 5, 1949), affirmed by an equally divided Court, 340 U.S. 880, habeas corpus was sought--after parole had been revoked--on the ground, inter alia, that the warrants by which the prisoners were retaken were deficient. The court rejected that claim on the ground that "[t]he warrant has become unimportant" where there had been a later valid revocation hearing.

The defect in the warrant issued in this case did not preclude a fair hearing. The purpose of the rule requiring that a warrant set forth the reasons for which revocation is sought is to apprise parolees of the violations charged in order to afford them sufficient opportunity to contest them.[6/] Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F. 2d 225 (1963). Appellant in this case was arrested in Cincinnati, Ohio, some 1200 miles from the district to which he was

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6/ In Hyser, the court said (at p. 245):

> If the application for the warrant is based on an alleged parole violation other than a conviction for a violation of law, the application shall contain a statement of the ground with such specificity . . . as will enable the parolee to meet the claim that he has violated a condition of parole. (Emphasis added).

paroled (petition p. 2). His unauthorized presence there was of itself a violation of his parole. And when confronted by a local probation officer, appellant, trying to explain his presence in Cincinnati, admitted other violations with which he ultimately was charged (Ex. #5), and the district court in Indiana so found (Ex. #7, p. 2). At the revocation hearing, he again admitted these violations. (Ex. #1, p. 1; Ex. #7, p. 4). Since appellant was, from the very beginning aware of his unlawful presence in Cincinnati and of the other violations charged (he had admitted them), it cannot be said that he was deprived of a chance to meet those charges. Certainly, it would not advance the underlying purpose of the rule--requiring that grounds be stated in a warrant--to hold a revocation invalid where the parolee has consistently and from the very beginning admitted rather than denied the violations charged. 7/

In any event, on September 27, 1963, twenty-three days before the revocation hearing, appellant--by his own admission (appellant's brief, p. 6)--was fully apprised of the grounds on which revocation was sought (Ex. #6; #7, p. 3).

7/ That he admitted only some of the violations charged and not all is irrelevant since a single violation is sufficient to sustain the order of revocation.

b. Appellant also claims that the revocation of his parole was invalid because he was not given a hearing at or near the place where the alleged violations occurred (Petition p. 3). But there was no necessity for a local hearing in view of the fact that appellant admitted violating the conditions of his parole (Ex. #1; #7, pp. 2, 4). In Hyser, the Court made it clear that a local hearing need be held only when the parolee has not been convicted of a crime while on parole and has denied violating the conditions of his parole.[8/] The sole purpose of such a hearing is to ascertain whether a violation has occurred.[9/] Cf. Hodge v. Markley, 339 F. 2d 973 (C.A. 7, 1965),

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8/ "Those who have not denied the charged violation of parole or any whose parole was revoked because of a criminal conviction would not now be benefited by a hearing which is designed specifically to make a record only in cases where the fact of violation is controverted." (Emphasis added). Hyser, supra, at 246.

9/ Discussing the procedure after the preliminary interview has been held, the court in Hyser said (Id. at 244):

> If the Board finds satisfactory evidence of parole violation the parolee then may be returned to a federal penitentiary to await final consideration of the proposed revocation of parole. However, if the Board finds there is an absence of satisfactory evidence of parole violation the parolee must be discharged forthwith and restored to his condition of freedom.

cert. denied, 381 U.S. 927; Richardson v. Markley, 339 F. 2d 967 (C.A. 7, 1965), cert. denied, 382 U.S. 851; Starnes v. Markley, 343 F. 2d 535, 537 (1965) cert. denied, 382 U.S. 908. Appellant from the very beginning admitted violating his parole and thus was not entitled to a local hearing under Hyser.[10/]

10/ Because of the view we have taken of this case it follows that appellant's argument at Point B. of his brief is erroneous. As we have shown above, that the warrant did not specify the violations charged did not, under the circumstances of this case, render appellant's detention illegal. That being the case, the allegation that the defect existed could not operate so as to prevent the entry of summary judgment. The same is true of his allegation that "the violations occurred in Texas". As demonstrated supra, at p. 13, appellant was not entitled to a local hearing. It was therefore entirely irrelevant where the parole violations occurred. Thus the assertion that they occurred in Texas could not prevent summary judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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SUPPLEMENTAL BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,331

WILLIAM RODGER STARNES, APPELLANT

v.

RICHARD CHAPPELL, CHAIRMAN, UNITED STATES
BOARD OF PAROLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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SUPPLEMENTAL BRIEF FOR APPELLEES

STATEMENT

This case was argued on Tuesday, March 5, 1966. On March 4, 1966, the day before the argument, appellees were served with a "Motion by Appellant Acting Pro Se To Clarify The Issues On Appeal Before This Court." In his motion appellant complained that the brief filed on his behalf by his court-appointed counsel failed to contain the "central issues on appeal." These "issues" were said to be his claims that he was denied the right to be

represented by retained counsel and to present witnesses at the revocation hearing and (2) that he was denied an "opportunity to appear" within the meaning of 18 U.S.C. 4207. At the oral argument counsel for appellant -- with the permission of the Court -- renewed these allegations. Accordingly, appellees requested and were granted additional time in which to file this brief in response to those two points.[1]

ARGUMENT

1. Before examining the merits of appellant's latest claims, we think it appropriate to point out that, as is the case with the allegations discussed in our opening brief, both of these issues were presented to and explored by the district court in Indiana and the Court of Appeals for the Seventh Circuit. Because appellant, with assistance of counsel, has been afforded a full evidentiary hearing on these points in what this Court has deemed a more appropriate forum (see the Brief For Appellees at

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1/ We did not respond to them in our opening brief because they had not been raised in this Court. See Brief for Appellees, footnote 2.

the violations with which he was charged (see Exhibit #7, p. 3 and Exhibit #6) and of his right to have retained counsel and witnesses present at the revocation hearing scheduled for October 20, 1963. Appellant then and there executed an "Attorney-Witness election Form" -- contained in the record as Exhibit #2 -- on which he waived his right to be represented by counsel and to the testimony of witnesses. The district court in Indiana, where appellant has previously litigated this issue and which conducted a full evidentiary hearing, specifically found that Appellant fully understood and appreciated the import of that waiver. The Indiana court said (Ex. #7, p. 3):

> [appellant] was presented with a printed "Attorney-Witness election form" . . . which he fully understood and which he voluntarily and knowingly signed in the place to elect to waive counsel and witnesses, and did thereby intend to waive counsel and witnesses.

Appellant also alleged that (Petition p. 4):

> [t]he Parole Board succeeded in circumventing . . . [his] . . . right to counsel and witnesses by not returning . . . [him] to the place of his alleged violation (where his counsel and witnesses would be readily available) and by offering . . . [appellant] . . . the opportunity to have counsel at his alleged revocation hearing at the federal prison, knowing full well, that the distance would serve to prohibit this.

pp. 8-9, discussing Phillips v. United States Board of Parole, ____ U.S. App. D.C. ___, 352 F.2d 711, (1965)) he may not relitigate them here.[2]

2. Appellant, in his complaint in the district court, alleged that (Petition p. 4):[3]

> although entitled to counsel of his choice, retained by him, and to witnesses before a member of the Parole Board at the Federal Institution, . . . [he] . . . was forced to waive counsel because of the distance (1200 miles) he was detained from said counsel and witnesses.

The record plainly shows that appellant was not denied his right to be represented by retained counsel and to present witnesses at his revocation hearing.

On September 26,[4] 1963 appellant was interviewed at the penitentiary by a parole officer, who informed him of

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2/ Appellant in his reply brief suggests that he should be afforded a new hearing in the District of Columbia because the district court in Indiana did not apply Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963) certiorari denied, sub nom; Jamison v. Chappell, 375 U.S. 957. Although it is not clear from the "Findings of Fact and Conclusions of Law" of that court (they are contained in the record as Exhibit #7) whether it applied Hyser, it is clear that the Court of Appeals for the Seventh Circuit did. Cf. Starnes v. Markley, 343 F.2d 535 (C.A. 7, 1965).

In any case it is doubtful whether this Court could properly sit as a reviewing court for another court of appeals.

3/ Appellant's complaint in the district court is styled a "Petition for Declaratory Judgment". It is herein referred to as his "petition."

4/ This date is mistakenly referred to as September 27, 1963, in the Brief for Appellees. The correct date is September 26, 1963. See Exhibit #7, p. 3.

Appellant contends, however, that had he been given a local hearing in Texas (where one violation occurred), he would not have waived his right to counsel since, apparently, he could have retained a lawyer in Texas but not at the prison in Indiana. But that claim depends upon his right to a local hearing in Texas, and -- as we demonstrated in our opening brief -- appellant was not entitled to a local hearing under Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963), certiorari denied, sub nom, Jamison v. Chappell, 375 U.S. 957. See our opening brief at pp. 13-14. Thus, the Board properly returned him to the penitentiary in Indiana, and in so doing the Board cannot be charged with circumventing appellant's right to counsel. Moreover, appellant knew or should have known that he could have had the revocation hearing postponed for another month -- at the very least -- to enable his attorney and witnesses to appear at the hearing in Indiana.[5/] Thus, the argument that it

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5/ The "Attorney-Witness election" form on which appellant waived his right to counsel and witnesses provides (see Exhibit #2):

> Counsel and/or witnesses may be heard, at the discretion of the alleged violator, either at the revocation hearing at the institution or at the Washington office of the Board of Parole. . . . If counsel and/or witnesses are to be heard at the institution, the hearing will be postponed upon request, for a period not exceeding thirty days for this purpose. (Emphasis added). The hearing will not be postponed beyond that period of time due to the absence of counsel or witnesses, except in the discretion of the Board.

was denied because he was forced to choose in Indiana is without substance.

3. Appellant also alleged that he "was denied an opportunity to a 'fair hearing' when . . . [the Board Member] . . . denied . . . [him] . . . an opportunity to bring to the attention of the Board evidence which would excuse the charge of parole violation." (Petition p. 4).

At the revocation hearing, appellant made statements by which he sought to justify and excuse some of the parole violations he had admitted. Admittedly, he was not permitted by the presiding Board member to state fully all of the details of the asserted justification (Ex. 7, p. 4). However, he was allowed, and the district court in Indiana so found, to state ". . . the substance . . . [of his justification] . . . and at some later date did write the full details . . . in a letter to a member of the Parole Board." See Exhibit #7, at p. 4. Appellant's version of the violations charged [6] was heard. Cf. Exhibit

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6/ At the oral argument counsel for appellant made statements to the effect that appellant -- because of the defect in the warrant -- was not informed of the violations charged until he appeared at the hearing. Earlier appellant in his pro se petition in the district court alleged that he was not "advised of the . . . violations until sometime in May of 1964, some eight (8) months after . . . [his] . . . arrest." Apart from the fact that these allegations are in themselves contradictory, neither finds support in the record. As we indicated in our Brief For Appellees at p. 12, the district court in Indiana found that appellant, on the day he was arrested, admitted several of the violations with which he was later charged (he effectively admitted

#1, United States Board of Parole Transcript of Minutes at Terre Haute, Indiana.

In any case, the Board will grant appellant a new hearing for this purpose at the penitentiary even now, should he request it. It should be noted that an offer to this effect was made to appellant more than a year ago but he has not yet requested such a hearing. See the Affidavits of the Casework Supervisor at the Penitentiary contained in the record as Exhibits #8, and 9. Whatever defect, if any, may have attached to the October 20, 1963, hearing has therefore been cured.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court be affirmed with respect to the additional matters contained in this brief.

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6/ cont'd. from preceding page.

five of the nine with which he was later charged) (Ex. #7, p. 2). It also found that "on or about September 26, 1963 . . . [appellant] . . . was interviewed by a caseworker or parole officer and . . . was informed . . . [cf. the violations charged] . . . (Ex. #7, p. 3). The caseworker's report of that interview is filed in the record as Exhibit #6. Thus, the record plainly demonstrates that appellant was informed and aware of the violations charged well in advance of the October 20, 1963, hearing.